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No. 95-1311

In the Supreme Court of the United States

OCTOBER TERM, 1995

PIETRO PARRAVANO, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JEAN E. WILLIAMS
DAVID C. SHILTON
JACQUES B. GELIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TERRY D. GARCIA
General Counsel
EILEEN COONEY
Attorney
National Oceanc & Atomospheric Administration
Department of Commerce
Seattle, Washington 98115
JOHN LESHY
Solicitor
STEVEN K. LINSCHEID
JOHN W. STEIGER
Attorney
Office of the Solicitor
Department of the Interior
Washington, D.C. 20240

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QUESTIONS PRESENTED

1. Whether the Yurok and Hoopa Valley Tribes have federally protected fishing rights that the Secretary of Commerce must take into account as "other applicable law" under the Magnuson Act, 16 U.S.C. 1854(a)(1), in setting harvest levels for Klamath River salmon.

2. Whether petitioners' claims under the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, and the Trinity River Basin Act, Pub. L. No. 98-541, 98 Stat. 2721, were properly dismissed on the ground that petitioners failed to allege that they had been adversely affected by specific agency action or inaction, as required by 5 U.S.C. 702.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 70 F.3d 539. The second opinion of the district court (Pet. App. 19-57) is reported at 861 F. Supp. 914. The first opinion of the district court (Pet. App. 58-86) is reported at 837 F. Supp. 1034.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1995. The petition for a writ of certiorari was filed on February 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Yurok and Hoopa Valley Tribes live on reservations that trace their origins to congressionally authorized Executive Orders. In the Act of

March 3, 1853, Congress gave the President authority to "make * * * reservations * * * in the State of California * * * for Indian purposes." Ch. 104, § 1, 10 Stat. 238. Acting under that authority, President Pierce issued an Executive Order in 1855 establishing the Klamath River Reservation. Pet. App. 25. The lands within that reservation were occupied by mostly Yurok Indians. *Ibid.*

In the Act of April 8, 1864, Congress authorized the President to set apart up to four tracts of land in California "for the purposes of Indian reservations." Ch. 49, § 2, 13 Stat. 40. Pursuant to that authority, the Superintendent of Indian Affairs for California established the Hoopa Valley Reservation, which was occupied mostly by Hoopa Indians. Pet. App. 25-26. In 1876, President Grant formally set aside the Hoopa Valley Reservation by Executive Order. *Id.* at 26. In 1891, President Harrison issued an Executive Order extending the Hoopa Valley Reservation so that it encompassed the Hoopa Valley Reservation, the Klamath River Reservation, and the 20-mile strip connecting them. *Ibid.*

The Hoopa-Yurok Settlement Act of 1988, Pub. L. No 100-580, 102 Stat. 2924, 25 U.S.C. 1300i *et seq.*, partitioned the extended reservation into the Hoopa Valley and Yurok Reservations. 25 U.S.C. 1300i-1(b) and (c). The Reservations remain partitioned in accordance with the Settlement Act.

The Yurok and Hoopa Valley Tribes historically have been dependent on salmon fishing, and the reservations were located to include the Klamath River Basin salmon fishery. Pet. App. 27; see also *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913). The Tribes' reliance on salmon fishing continues to this day. Pet. App. 28.

b. The Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.*, was enacted to conserve ocean fishing resources. 16 U.S.C. 1801(b). The Act gives the Department of Commerce authority to regulate ocean fishing between three nautical miles and two hundred nautical miles offshore. The Act also establishes Fishery Management Councils, which have the authority to recommend ocean harvest limits (the number of fish that may be caught) and spawning escapement levels (the number of fish that are allowed to escape so that they can spawn). 16 U.S.C. 1852. The Secretary of Commerce reviews council recommendations for consistency with the standards set forth in the Magnuson Act and "other applicable law." 16 U.S.C. 1854(a)(1)(B). Based on that review, the Secretary may either approve or disapprove the council's recommendations. 16 U.S.C. 1854. When necessary, the Secretary may issue emergency regulations. 16 U.S.C. 1855(c)(1).

c. The Klamath River chinook is an anadromous species of salmon. Pet. App. 20. They hatch in the Klamath River and its tributaries, migrate downstream to the ocean, and then return to their fresh water origins to spawn and die. *Ibid.* The harvesting of chinook is subject to three regulatory regimes. The Secretary of the Interior has authority over the Yurok and Hoopa Valley Tribes' on-reservation fishing. The State of California has authority over non-Indian river fishing and fishing in coastal waters from the shore to three miles off-shore. The Secretary of Commerce has authority under the Magnuson Act beyond the three mile limit.

d. The Pacific Fishery Management Council (Pacific Council) has responsibility under the Magnuson

Act to recommend harvest and escapement levels for the Klamath River chinook. Pet. App. 64-65. Prior to 1993, the Pacific Council's management had not proven adequate to achieve the necessary escapement. *Id.* at 69. As a consequence, the Department of the Interior's Bureau of Indian Affairs had severely curtailed Indian salmon harvesting in the Klamath River. *Ibid.*

In March 1993, the Secretary of the Interior informed the Secretary of Commerce of his view that, pending guidance from the Interior Solicitor, the Tribes should receive a 50% share of the total Klamath River chinook harvest and that ocean harvesting of the chinook should be regulated under the Magnuson Act so that a sufficient number of fish could reach the River for spawning and tribal harvest. Pet. App. 7. The Solicitor of the Department of the Interior subsequently issued an opinion concluding that the Tribes have a federal right to a share of the fishery resources of up to 50% in order to support their moderate living needs. *Id.* at 29. The Secretary of Commerce then issued an interpretive regulation stating that he would treat the Tribe's fishing rights, as determined in the Solicitor's opinion, as "other applicable law" within the meaning of the Magnuson Act, and that he would therefore approve recommendations for harvest levels only if they were consistent with the Solicitor's opinion. *Ibid.*

In April 1993, the Pacific Council recommended a 22% ocean harvest rate, with a spawning escapement floor of 35,000. Pet. App. 7, 70-71. That recommendation assumed a 32.5%, rather than a 50%, Indian in-river harvest share. *Id.* at 70-71. The Secretary of Commerce disapproved the council's recommendation and reached an agreement with the Secretary of the

Interior concerning the appropriate course of action for the 1993 season. *Id.* at 71. The Secretary of the Interior agreed to limit the Tribes to a 44.6% share, and the Secretary of Commerce agreed to limit the ocean harvest rate to 14.5% and increase the escapement floor to 38,000. *Ibid.* The Secretary of Commerce then issued an emergency regulation incorporating the 14.5% harvest rate and the 38,000 escapement floor. *Id.* at 66.

2. Petitioners, who are commercial fishermen and commercial fishing associations, filed suit alleging that the Secretary of Commerce improperly reduced the harvest levels for the 1993 season in violation of the Magnuson Act. In particular, they claimed that the Tribes do not have federally reserved fishing rights and that the Secretary therefore did not have the authority to limit ocean harvest levels in order to protect such rights. They also alleged that the Secretary of the Interior had violated the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, and the Trinity River Basin Act, Pub. L. No. 98-541, 98 Stat. 2721, by failing to restore Klamath River runs. Pet. App. 1-2.

The district court rejected petitioners' claims. Pet. App. 19-57. The court held that the United States had reserved Indian fishing rights when it established what are today the Yurok and Hoopa Valley Reservations. It reasoned that a fishing right could be reserved by congressionally authorized Executive Order as well as by treaty and that the Executive Orders establishing the Yurok and Hoopa Valley Reservations had reserved such a right. *Id.* at 32-36. The court further held that, for the Tribes federally-reserved right to have meaning, off-reservation fishing must be limited to the extent necessary

to preserve that right. *Id.* at 36-40. The court therefore concluded that the Secretary of Commerce did not violate the Magnuson Act when he took into account the Tribes' fishing rights as "applicable law" in setting ocean harvest levels. *Id.* at 40-42.

The district court also held that petitioners' claims that the Secretary of the Interior had violated the Klamath Basin Act and the Trinity Basin Act were not subject to judicial review. Pet. App. 52-56. The court concluded that petitioners' claims were not subject to review under the Administrative Procedure Act, 5 U.S.C. 702, because petitioners had failed to identify any specific agency action that adversely affected them. Pet. App. 52-54. The court also concluded that neither the Klamath Basin Act nor the Trinity Basin Act created implied rights of action. *Id.* at 54-56.

3. The court of appeals affirmed, Pet. App. 1-18, expressly adopting the reasoning of the district court, *id.* at 3. The court went on to emphasize that fishing rights created by congressionally authorized Executive Orders have the same status as fishing rights reserved by treaty. *Id.* at 10-15. The court also stressed that the United States has a duty to protect the Tribe's on-reservation fishing rights by preventing the overharvesting of fish while they are still in the ocean. *Id.* at 16-17.

ARGUMENT

1. Petitioners contend (Pet. 17-19) that the Yurok and the Hoopa Valley Tribes do not have fishing rights that are protected by federal law because their reservations were established by Executive Orders that do not specifically mention fishing rights. That

contention is without merit and does not warrant this Court's review.

a. Under this Court's decision in *Menominee Tribe* v. *United States*, 391 U.S. 404, 405-406 (1968), when a reservation is established for Indian purposes, a right to hunt and fish on the reservation is reserved by implication. The existence of such an implied right is particularly clear when the site for the reservation is chosen because of its suitability for hunting and fishing. *Id.* at 406.

The court of appeals correctly concluded that, under the analysis set forth in *Menominee Tribe*, the Yurok and Hoopa Valley Tribes have a right to fish on their reservations. Congress expressly authorized the President to set aside reservations in California "for Indian purposes," and the Yurok and Hoopa Valley Reservations were established by Executive Orders pursuant to that statutory authority. Moreover, the Klamath River site for the reservations was chosen precisely because the river "abounded in salmon and other fish." *Mattz* v. *Arnett*, 412 U.S. 481, 487 (1973). In those circumstances, the establishment of what are today the Yurok and Hoopa Valley Reservations created a reserved right on the part of the Indians to fish on those reservations.

Menominee involved a reservation created by treaty, rather than by statutorily authorized Executive Order. But reserved rights are also created when a reservation is established by Executive Order. *Arizona* v. *California*, 373 U.S. 546, 598 (1963). In *Arizona* v. *California*, the Court squarely rejected the argument that implied rights could be created only by treaty, stating that "[w]e can give but short shrift at this late date to the argument that the reservations either of land or water are invalid

because they were originally set apart by the Executive." *Ibid.* Just as it must be assumed that the United States intended to deal fairly with the Indians when it established a reservation by treaty, so it must be assumed that the United States intended to deal fairly with the Indians when it established a reservation by Executive Order. *Id.* at 600.

Consistent with that understanding, the federal and state courts that have considered the issue have uniformly held that the Yurok and Hoopa Valley Tribes have a federally protected right to take fish from the Klamath River. *United States* v. *Eberhardt*, 789 F.2d 1354, 1359-1360 (9th Cir. 1986); *People* v. *McCovey*, 685 P.2d 687, 697 (Cal.), cert. denied, 469 U.S. 1062 (1984); *Mattz* v. *Superior Court*, 758 P.2d 606 (Cal. 1988), cert. denied, 489 U.S. 1078 (1989); *Arnett* v. *Five Gill Nets*, 121 Cal. Rptr. 906, 911 (1975), cert. denied, 425 U.S. 907 (1976); *Donahue* v. *California District Court*, 93 Cal. Rptr. 310, 313, cert. denied, 404 U.S. 990 (1971).

b. Because the Tribes have a right to harvest fish on their reservations, the Secretary of Commerce had the responsibility to limit the ocean harvesting of such fish to the extent necessary to protect that right. As the court of appeals explained, "allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights." Pet. App. 16.

In reaching the conclusion that the Secretary could regulate ocean fishing in order to protect the Tribes' right to fish on their Reservations, the court of appeals correctly relied on this Court's decisions involving implied water rights. In that context, the Court has held that, in order to protect a Tribe's on-

reservation water rights, steps may be taken to limit off-reservation water use. *Arizona* v. *California*, 373 U.S. at 596-600; *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Because the Tribes' right to fish in this case, like the right to water, is "essential to the life of the Indian people," *Arizona* v. *California*, 373 U.S. at 599, the principle involved in the water rights cases is equally applicable here. See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 684 (1979) (citing *Arizona* v. *California* for the proposition that rights implicitly secured in the establishment of a reservation may be enforced by a fair apportionment of the resource in question between Indians and non-Indians).[1]

c. Petitioners contend (Pet. 15, 19-20) that the decision below "conflicts in principle" with *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476 (D.C. Cir. 1995), and *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), petition for cert. pending, No. 95-9560 (filed Mar. 25, 1996). There is, however, no such conflict. In the cases cited by petitioners, the relevant treaties gave the Tribes an off-reservation right to "hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the

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[1] Petitioners' apparent view (Pet. 17-18) that the Secretary of Commerce lacks power to protect fishing rights created by Executive Order because the Magnuson Act specifically requires an ocean management plan to describe "the nature and extent of * * * Indian treaty fishing rights, if any," 16 U.S.C. 1853(a)(2), is without merit. Section 1853(a)(2) refers to Indian treaty fishing rights in *ocean* areas, not to *in-river* fishing rights. Whether protected by treaty, statute, or Executive Order, in-river fishing rights must be taken into account as "other applicable law" under 16 U.S.C. 1853(a)(1)(C).

hunting districts." *Shoshone-Bannock Tribes*, 56 F.3d at 1478; *Crow Tribe*, 73 F.3d at 987. In *Shoshone-Bannock*, the D.C. Circuit held that the pertinent treaty language did not require the Attorney General to file a claim on the Tribe's behalf for water rights to support contingent hunting rights on off-reservation unoccupied lands of the United States. 56 F.3d at 1480-1484. In *Crow Tribe*, 73 F.3d at 987-989, the Tenth Circuit held that the pertinent treaty language granted a temporary right to hunt and fish off the reservation that ended when Wyoming was admitted to the Union. Thus, the cases relied upon by petitioners concern the scope of *off-reservation* rights. In contrast, this case concerns the scope of *on-reservation* rights. The decisions cited by petitioners are therefore inapposite here. *People* v. *McCovey*, 685 P.2d at 697.[2]

d. Petitioners' remaining contentions are also unpersuasive. Petitioners assert (Pet. 22-25) that the Secretary of Commerce's decision in this case conflicts with prior administrative interpretations of the Magnuson Act. Even before this case arose, however, the fishery management plan for ocean harvest that affects the Klamath River area had required the Pacific Council to account for the "requirements of the Indian fishery for salmon on the Klamath River." Pet. App. 66. More generally, the federal government has long recognized the Indian fishing rights involved in this case, even though

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[2] Because this case involves an on-reservation right to fish, petitioners' reliance on the equal footing doctrine (Pet. 21) is especially misplaced. This Court held in *Arizona* v. *California*, 373 U.S. at 597-598, that the equal footing doctrine does not preclude the United States from reserving rights "for its reservations and its property."

coordination of management measures between the Departments of Commerce and the Interior before 1993 was sometimes lacking. *Eberhardt*, 789 F.2d at 1363-1364 (Beezer, J., concurring).

Petitioners also challenge (Pet. 21-22) the court of appeals' statement that Executive Orders should be interpreted as the Indians would have understood them. But while the court stated that "Executive Orders, no less than treaties, must be interpreted as the Indians would have understood them and any doubtful expression in them should be resolved in the Indians' favor," Pet. App. 9, it applied only the latter part of that interpretive principle in this case, *id.* at 14. The court of appeals specifically held that "fishing rights arise by implication when a reservation is set aside for Indian purposes," *id.* at 13, rejecting petitioners' "novel theory that ambiguity in the phrase 'for Indian purposes' should be resolved against the Tribes," *id.* at 14. For the reasons discussed above, that holding is consistent with this Court's decisions.

Finally, petitioners express concern (Pet. 27-28) that the decision below will create fishing rights for numerous other Tribes. The decision below, however, applied well established principles to the particular circumstances involved in the establishment of the reservations at issue here. That decision does not create a broad ruling applicable to all Tribes, regardless of their circumstances. The cases cited by petitioners (Pet. 27) do not suggest otherwise. In those cases, the Tribes have argued that the decision below supports their right to fish off-reservation. But the Ninth Circuit has not ruled on that question, and nothing in the decision in this case purports to resolve it.

2. Petitioners also present the question whether fishermen may enforce the mandate in the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, that the Secretary of the Interior "shall formulate, establish and implement a 20-year program to restore" Klamath River salmon. Pet. i. Because petitioners fail to include any argument addressed to that question in the body of their petition, however, that question is not properly presented.

In any event, the district court correctly dismissed petitioners' claim under the Klamath Restoration Act (as well as a similar claim under the Trinity Basin Act), because petitioners failed to allege that they had been adversely affected or aggrieved by any specific agency action or inaction. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882 (1990). Petitioners' general allegation that the Secretary of the Interior has failed to implement measures to improve the Klamath River runs (Pet. App. 53) is insufficient to justify review under *Lujan*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JEAN E. WILLIAMS
DAVID C. SHILTON
JACQUES B. GELIN
Attorneys

TERRY D. GARCIA
General Counsel
EILEEN COONEY
Attorney
National Oceanc & Atomospheric Administration
Department of Commerce
JOHN LESHY
Solicitor
STEVEN K. LINSCHEID
JOHN W. STEIGER
Attorney
Office of the Solicitor
Department of the Interior

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